



Oregon

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October 15, 2007

To: Claimant and Interested Persons

From: Cora R. Parker, Acting Director



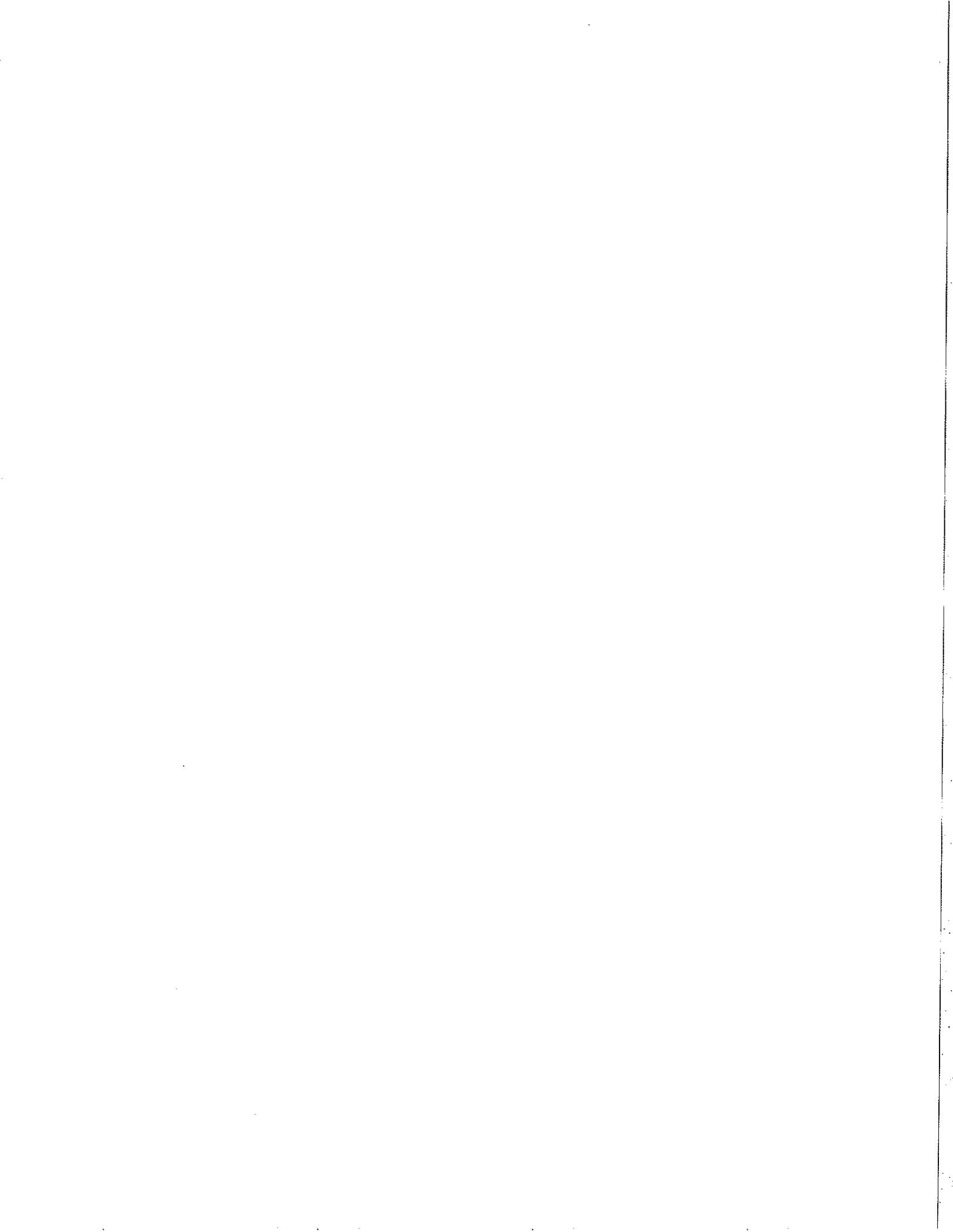
Re: Ballot Measure 37 (ORS 197.352) Claim Number M131147

Claimants: Justin and Linda Eifert

Enclosed, in regard to the above-referenced claim for compensation under Ballot Measure 37 (ORS 197.352), is the Department of Land Conservation and Development's Draft Staff Report and Recommendation.

This Draft Staff Report and Recommendation sets forth the department's evaluation of and recommendation on the claim. Oregon Administrative Rule 125-145-0100(3) provides that the claimant (or the claimant's agent) and any third parties who submitted comments on the claim may submit written comments, evidence, and information in response to any third-party comments contained in the report, and to the staff report and recommendation itself. Such response must be filed no more than 15 calendar days after the date of mailing of this report. Any response from you must be delivered to the Oregon Department of Administrative Services (DAS), 1225 Ferry Street SE, U160, Salem, Oregon 97301, and will be deemed timely filed if either postmarked on the 15th day or actually delivered to DAS by the close of business on the 15th day.

This department will review any responses submitted, and a Final Order on the claim will be issued after such review.



ORS 197.352 (BALLOT MEASURE 37) CLAIM FOR COMPENSATION
OREGON DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT
Draft Staff Report and Recommendation

October 15, 2007

STATE CLAIM NUMBER: M131147

NAMES OF CLAIMANTS: Justin and Linda Eifert

MAILING ADDRESS: 8719 Buckhorn Road
Roseburg, Oregon 97470

PROPERTY IDENTIFICATION: Township 27S, Range 4W
Section 13: tax lots 100, 101 and 200
Section 14: tax lot 503
Douglas County

DATE RECEIVED BY DAS: November 24, 2006

DEADLINE FOR FINAL ACTION:¹ May 17, 2008

I. SUMMARY OF CLAIM

The claimants, Justin and Linda Eifert, seek compensation in the amount of \$100,000 for the reduction in fair market value as a result of land use regulations that are alleged to restrict the use of certain private real property. The claimants desire compensation or the right to divide the 163.25-acre subject property into two parcels, with one existing dwelling on each parcel, and to develop a second, accessory farm-dwelling on each of the two parcels.² The subject property is located at 8719 Buckhorn Road, near Roseburg, in Douglas County. (See claim.)

II. SUMMARY OF STAFF RECOMMENDATION

Based on the preliminary findings and conclusions set forth below, the Department of Land Conservation and Development (the department) has determined that the claim is valid. Department staff recommends that, in lieu of compensation, the requirements of the following state laws enforced by the Land Conservation and Development Commission (the Commission) or the department not apply to Justin and Linda Eifert's division of the 163.25-acre subject property into two parcels with one existing dwelling on each parcel, and to their development of

¹ ORS 197.352, as originally enacted, required that final action on claims made under Measure 37 be made within 180 days of the date the claim was filed. In response to the large volume of claims filed in late 2006, the Oregon legislature passed House Bill 3546, which became effective on May 10, 2007. This legislation increased the amount of time state and local governments have to take final action on Measure 37 claims filed on or after November 1, 2006, by 360 days, to a total of 540 days.

² The subject property includes four tax lots totaling 163.25 acres. Tax lot 100 consists of 72.27 acres, tax lot 101 consists of 5 acres, tax lot 200 consists of 80.98 acres and tax lot 503 consists of 5 acres.

a second, accessory farm-dwelling on each of the two parcels: applicable provisions of Statewide Planning Goals 3 (Agricultural Lands) and 4 (Forest Lands), ORS 215 and Oregon Administrative Rules (OAR) 660, divisions 6, and 33, enacted or adopted after February 13, 1989. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on February 13, 1989. (See the complete recommendation in Section VI. of this report.)

III. COMMENTS ON THE CLAIM

Comments Received

On July 5, 2007, pursuant to OAR 125-145-0080, the Oregon Department of Administrative Services (DAS) provided written notice to the owners of surrounding properties. According to DAS, no written comments were received in response to the 15-day notice.

IV. TIMELINESS OF CLAIM

Requirement

ORS 197.352(5) requires that a written demand for compensation be made:

1. For claims arising from land use regulations enacted prior to the effective date of Measure 37 (December 2, 2004), within two years of that effective date, or the date the public entity applies the land use regulation as an approval criteria to an application submitted by the owner, whichever is later; or
2. For claims arising from land use regulations enacted after the effective date of Measure 37 (December 2, 2004), within two years of the enactment of the land use regulation, or the date the owner of the property submits a land use application in which the land use regulation is an approval criteria, whichever is later.

Findings of Fact

This claim was submitted to DAS on November 24, 2006, for processing under OAR 125, division 145. The claim identifies Douglas County zoning as the basis for the claim. Only laws that were enacted or adopted prior to December 2, 2004, are the basis for this claim.

Conclusions

The claim has been submitted within two years of the effective date of Measure 37 (December 2, 2004), based on land use regulations enacted or adopted prior to December 2, 2004, and is therefore timely filed.

V. ANALYSIS OF CLAIM

1. Ownership

ORS 197.352 provides for payment of compensation or relief from specific laws for “owners” as that term is defined in ORS 197.352. ORS 197.352(11)(C) defines “owner” as “the present owner of the property, or any interest therein.”

Findings of Fact

The claimants, Justin and Linda Eifert, acquired the subject property on February 13, 1989, as reflected by a quitclaim deed included with the claim. On March 4, 1994, the claimants transferred the property to the Eifert Loving Trust, a revocable trust, as reflected by a deed included with the claim.³ The Douglas County Assessor’s Office confirms the claimants’ current ownership of the subject property.

Conclusions

The claimants, Justin and Linda Eifert, are “owners” of the subject property as that term is defined by ORS 197.352(11)(C), as of February 13, 1989.

2. The Laws That are the Basis for This Claim

In order to establish a valid claim, ORS 197.352(1) requires, in part, that a law must restrict the claimants’ use of private real property in a manner that reduces the fair market value of the property relative to how the property could have been used at the time the claimants or a family member acquired the property.

Findings of Fact

The claim indicates that the claimants desire to divide the 170.35-acre subject property into two parcels with an existing dwelling on each parcel, and to develop a second, accessory farm-dwelling on each of the two parcels, and that the property’s current zoning prevents the desired use.

The claim is based generally on the applicable provisions of state law that require Exclusive Farm Use (EFU) and mixed agriculture-forest zoning and restrict uses on land zoned EFU and mixed agriculture-forest.

Tax lots 100, 101 and 503 are zoned EFU-Grazing (FG) by Douglas County as required by Goal 3, in accordance with ORS 215 and OAR 660, division 33, because the claimants’ property is “agricultural land” as defined by Goal 3.⁴ Goal 3 became effective on January 25, 1975, and required that agricultural lands as defined by Goal 3 be zoned EFU pursuant to ORS 215.

³ Transfer of property to a revocable trust does not result in a change in ownership for purposes of ORS 197.352.

⁴ The claimants’ property is “agricultural land” because it contains Natural Resources Conservation Service Class I-IV soils.

Current land use regulations, particularly ORS 215.263, 215.284 and 215.780 and OAR 660, division 33, enacted or adopted pursuant to Goal 3, prohibit the division of EFU-zoned land into parcels less than 80 acres and establish standards for development of dwellings on existing or proposed parcels on that land.

ORS 215.780 establishes an 80-acre minimum size for the creation of new lots or parcels in EFU zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993). ORS 215.263 (2005 edition) establishes standards for the creation of new parcels for non-farm uses and dwellings allowed in an EFU zone.

OAR 660-033-0135 (applicable to farm dwellings) became effective on March 1, 1994, and interprets the statutory standard for a primary dwelling in an EFU zone under ORS 215.283(1)(f). OAR 660-033-0130(4) (applicable to non-farm dwellings) became effective on August 7, 1993, and was amended to comply with ORS 215.284(4) on March 1, 1994.⁵

Tax lot 200 is zoned Farm Forest (FF) by Douglas County. The county's FF zone is a mixed agricultural and forest land zone, in accordance with Goals 3 and 4, as implemented by OAR 660-006-0050. Goals 3 and 4 became effective on January 25, 1975, and required that agricultural lands as defined by Goal 3 be zoned for farm uses and that forest lands under Goal 4 be zoned for forest uses. OAR 660-006-0050 authorizes local governing bodies to establish mixed agriculture-forest zones in accordance with Goals 3 and 4 and OAR 660, divisions 6, and 33.

Under OAR 660-006-0050(2), effective on February 5, 1990, and subsequently amended on March 1, 1994, to comply with the provisions of House Bill 3661 (Chapter 792, Oregon Laws 1993), uses allowed in EFU zones under Goal 3 and forest zones under Goal 4 are allowed in mixed agriculture-forest zones.

For land divisions, OAR 660-006-0055 requires local governing bodies to apply the standards of OAR 660-006-0026 and 660-033-0100, which implement the minimum lot size requirements in ORS 215.780. ORS 215.780(1) establishes an 80-acre minimum for the creation of new lots or parcels in EFU and forest zones and became effective on November 4, 1993 (Chapter 792, Oregon Laws 1993).

For the approval and siting of dwellings, under OAR 660-006-0050(2) and (3), counties must apply either the OAR 660, division 6, or 33, standards based on the predominant use of the tract on January 1, 1993.⁶ The provisions of OAR 660-006-0027 and 660-006-0029 apply to dwelling approval and siting where the predominant use of the tract on that date was forest, and the provisions of OAR 660-033-0030 and 660-033-0035 apply where the predominant use of the tract on that date was agriculture.

⁵ The Commission adopted amendments to OAR 660-033-0100, -0130 and -0135 to comply with House Bill 3326 (Chapter 704, Oregon Laws 2001, effective on January 1, 2002), which were effective on May 22, 2002. These amendments clarified but did not further restrict dwelling standards under OAR 660, division 33, for EFU-zoned land.

⁶ The claim does not include information regarding the predominant use of the property on January 1, 1993.

At the time the claimants acquired the subject property, it was subject to Douglas County's acknowledged comprehensive plan zoning ordinances.⁷ At that time, tax lots 100, 101 and 503 were zoned FG, which required an 80-acre minimum lot size for new lots or parcels and dwellings in conjunction with farm use, and allowed a variance to create new lots or parcels below 75 acres. Tax lot 200 was zoned FF, which required an 80-acre minimum to create new lots or parcels. The claimants' desired use of the subject property would have been subject to compliance with Goals 3 and 4, and OAR 660, divisions 5, and 6, as implemented through the county's acknowledged FG and FF zones, and the applicable provisions of ORS 215 then in effect.⁸

The claim does not establish whether or to what extent the claimants' desired division and development of the subject property were allowed under the standards in effect when they acquired the property on February 13, 1989.

Conclusions

The current zoning requirements, minimum lot size and dwelling standards established by Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, were all enacted or adopted after the claimants acquired the subject property in 1989 and do not allow the claimants' desired division or development of the property. However, the claim does not establish whether or to what extent the claimants' desired use of the subject property complies with the standards for land divisions and development under Goals 3 and 4 and OAR 660, divisions 5, and 6, as implemented through Douglas County's acknowledged comprehensive plan and FG and FF zones, and applicable provisions of ORS 215 in effect when the claimants acquired the property on February 13, 1989.

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property based on the uses that the claimants have identified. There may be other laws that currently apply to the claimants' use of the subject property, and that may continue to apply to the claimants' use of the property, that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of the subject property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use.

⁷ Douglas County's FG and FF zones were acknowledged by the Commission for compliance with Goal 3 on December 24, 1985, and with Goal 4 on January 18, 1983, respectively.

⁸ After the county's comprehensive plan and land use regulations were acknowledged by the Commission as complying with the statewide planning goals, the goals and implementing rules no longer applied directly to individual local land use decisions. *Byrd v. Stringer*, 295 Or 311 (1983). However, statutory requirements continue to apply, and insofar as the state and local provisions are materially the same, the local provisions must be interpreted consistent with the substance of the goals and implementing rules. *Forster v. Polk County*, 115 Or App 475 (1992) and *Kenagy v. Benton County*, 115 Or App 131 (1992).

In 1989, ORS 215.263 (1987 edition) required that divisions of land in EFU zones be "appropriate for the continuation of the existing commercial agricultural enterprise within the area" or not smaller than the minimum size in the county's acknowledged plan. ORS 215.283(1)(f) (1987 edition) generally allowed farm dwellings "customarily provided in conjunction with farm use." Non-farm dwellings were allowed under ORS 215.283(3) if they were determined to be compatible with farm use, not interfere seriously with accepted farm practices, not materially alter the stability of the land use pattern in the area and be situated on generally unsuitable land for the production of farm crops and livestock.

3. Effect of Regulations on Fair Market Value

In order to establish a valid claim, ORS 197.352(1) requires that the land use regulation(s) (described in Section V.(2) of this report) must have "the effect of reducing the fair market value of the property, or any interest therein."

Findings of Fact

The claim includes an estimate of \$100,000 as the reduction in the subject property's fair market value due to the regulations that restrict the claimants' desired use of the property. This amount is based on an assessment from a real estate broker, included with the claim.

Conclusions

As explained in Section V.(1) of this report, the claimants are Justin and Linda Eifert who acquired the subject property on February 13, 1989. Under ORS 197.352, the claimants are due compensation for land use regulations that restrict the use of the subject property and have the effect of reducing its fair market value. Based on the findings and conclusions in Section V.(2) of this report, laws enacted or adopted since the claimants acquired the subject property restrict the claimants' desired use of the property. The claimants estimate that the effect of the regulations on the fair market value of the subject property is a reduction of \$100,000.

Without an appraisal or other documentation and without verification of whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when they acquired the property, it is not possible to substantiate the specific dollar amount by which the land use regulations have reduced the fair market value of the property. Nevertheless, based on the evidence in the record for this claim, the department determines that the fair market value of the subject property has been reduced to some extent as a result of land use regulations enforced by the Commission or the department.

4. Exemptions Under ORS 197.352(3)

ORS 197.352 does not apply to certain land use regulations. In addition, under ORS 197.352(3), certain types of laws are exempt from ORS 197.352.

Findings of Fact

The claim is based on state land use regulations that restrict the use of the subject property, including applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, which Douglas County has implemented through its current EFU and FF zones. With the exception of amendments enacted or adopted after February 13, 1989, Goals 3 and 4, ORS 215 and OAR 660 were in effect when the claimants acquired the subject property.

Conclusions

Without a specific development proposal for the subject property, it is not possible for the department to determine all the laws that may apply to a particular use of the property, or whether those laws may fall under one or more of the exemptions under ORS 197.352. It

appears that the general statutory, goal and rule restrictions on division and development of the subject property are not exempt under ORS 197.352(3)(E) only to the extent they were enacted or adopted after the claimants acquired the property on February 13, 1989. Provisions of Goals 3 and 4, ORS 215 and OAR 660 in effect when the claimants acquired the subject property in 1989 are exempt under ORS 197.352(3)(E) and will continue to apply to the property.

Other laws in effect when the claimants acquired the subject property are also exempt under ORS 197.352(3)(E) and will continue to apply to the claimants' use of the property. In addition, the department notes that ORS 215.730 and OAR 660, division 6, particularly OAR 660-006-0027, -0029 and -0035, include fire protection standards for dwellings and structures in forest and mixed agriculture-forest zones. ORS 197.352 (3)(B) specifically exempts regulations "restricting or prohibiting activities for the protection of public health and safety, such as fire and building codes. . . ." Accordingly, the siting standards for dwellings and structures in forest zones in ORS 215.730 and in forest and mixed agriculture-forest zones in OAR 660, division 6, are exempt under ORS 197.352(3)(B). Douglas County also notes that a portion of the property is located in a flood plain zone. To the extent the county's flood plain regulations are based on state law, these regulations would also be exempt under ORS 197.352(3)(B).

There may be other laws that continue to apply to the claimants' use of the subject property that have not been identified in the claim. In some cases, it will not be possible to know which laws apply to a use of property until there is a specific proposal for that use. When the claimants seek a building or development permit to carry out a specific use, it may become evident that other state laws apply to that use. In some cases, some of these laws may be exempt under ORS 197.352(3)(A) to (D).

This report addresses only those state laws that are identified in the claim, or that the department is certain apply to the subject property, based on the uses that the claimants have identified. Similarly, this report only addresses the exemptions provided for under ORS 197.352(3) that are clearly applicable, given the information provided to the department in the claim. The claimants should be aware that the less information they have provided to the department in the claim, the greater the possibility that there may be additional laws that will later be determined to continue to apply to their use of the subject property.

VI. FORM OF RELIEF

ORS 197.352(1) provides for payment of compensation to an owner of private real property if the Commission or the department has enforced one or more laws that restrict the use of the property in a manner that reduces its fair market value. In lieu of compensation, the department may choose to not apply the law in order to allow the present owner to carry out a use of the property permitted at the time the present owner acquired the property. The Commission, by rule, has directed that if the department determines a claim is valid, the Director of the department must provide only non-monetary relief unless and until funds are appropriated by the legislature to pay claims.

Findings of Fact

Based on the findings and conclusions set forth in this report, laws enforced by the Commission or the department restrict the claimants' desired use of the subject property. The claim asserts

that existing state land use regulations enforced by the Commission or the department have the effect of reducing the fair market value of the subject property by \$100,000. However, because the claim does not provide an appraisal or other relevant evidence demonstrating that the land use regulations described in Section V.(2) reduce the fair market value of the subject property, a specific amount of compensation cannot be determined. In order to determine a specific amount of the compensation due for this claim, it would also be necessary to verify whether or the extent to which the claimants' desired use of the subject property was allowed under the standards in effect when they acquired the property. Nevertheless, based on the record for this claim, the department has determined that the laws on which the claim is based have reduced the fair market value of the subject property to some extent.

No funds have been appropriated at this time for the payment of claims. In lieu of payment of compensation, ORS 197.352 authorizes the department to modify, remove or not apply all or parts of certain land use regulations to allow Justin and Linda Eifert to use the subject property for a use permitted at the time they acquired the property on February 13, 1989.

Conclusions

Based on the record, the department recommends that the claim be approved, subject to the following terms:

1. In lieu of compensation under ORS 197.352, the State of Oregon will not apply the following laws to Justin and Linda Eifert's division of the 163.25-acre subject property into two parcels, with one existing dwelling on each parcel, and to their development of a second, accessory farm-dwelling on each of the two parcels: applicable provisions of Goals 3 and 4, ORS 215 and OAR 660, divisions 6, and 33, enacted or adopted after February 13, 1989. These laws will not apply to the claimants only to the extent necessary to allow them to use the subject property for the use described in this report, and only to the extent that use was permitted when they acquired the property on February 13, 1989.
2. The action by the State of Oregon provides the state's authorization to the claimants to use the property for the use described in this report, subject to the standards in effect on February 13, 1989. On that date, the property was subject to compliance with Goals 3 and 4 and OAR 660, divisions 5, and 6, as implemented by Douglas County's acknowledged FG and FF zones, and the applicable provisions ORS 215 then in effect.
3. To the extent that any law, order, deed, agreement or other legally enforceable public or private requirement provides that the subject property may not be used without a permit, license or other form of authorization or consent, the order will not authorize the use of the property unless the claimants first obtain that permit, license or other form of authorization or consent. Such requirements may include, but are not limited to: a building permit, a land use decision, a "permit" as defined in ORS 215.402 or 227.160, other permits or authorizations from local, state or federal agencies and restrictions on the use of the subject property imposed by private parties.
4. Any use of the property by the claimants under the terms of the order will remain subject to the following laws: (a) those laws not specified in (1) above; (b) any laws enacted or enforced by a public entity other than the Commission or the department; and (c) those laws not subject to ORS 197.352 including, without limitation, those laws exempted under ORS 197.352(3).

5. Without limiting the generality of the foregoing terms and conditions, in order for the claimants to use the subject property, it may be necessary for them to obtain a decision under ORS 197.352 from a city and/or county and/or metropolitan service district that enforces land use regulations applicable to the property. Nothing in this order relieves the claimants from the necessity of obtaining a decision under ORS 197.352 from a local public entity that has jurisdiction to enforce a land use regulation applicable to a use of the subject property by the claimants.

6. Nothing in this report or the state's final order for this claim constitutes any determination of ownership by the State of Oregon as to submerged or submersible lands, or as to public rights to the use of waters of the state.

VII. NOTICE OF OPPORTUNITY TO COMMENT

This staff report is not a final decision by the department and does not authorize any use of the property that is the subject of this report. OAR 125-145-0100 provides an opportunity for the claimants or the claimants' authorized agent and any third parties who submitted comments under OAR 125-145-0080 to submit written comments, evidence and information in response to the draft staff report and recommendation. Such response must be filed no more than 15 calendar days after the date this report is mailed to the claimants and any third parties. Responses to this draft staff report and recommendation will be considered only as comments related to the claim described in this report. All responses must be delivered to the Oregon Department of Administrative Services (DAS), Measure 37 Unit, Risk Management-State Services Division, 1225 Ferry Street SE, U160, Salem, Oregon 97301-4292 and will be deemed timely filed if either postmarked on the 15th day, or actually delivered to DAS by the close of business on the 15th day. Note: Please reference the claim number, claimant name and clearly mark your comments as "Draft Staff Report comments." Comments must be submitted in writing only. Those comments submitted electronically or by facsimile will not be accepted.

